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10  
11 **UNITED STATES DISTRICT COURT**  
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 FREDERICK RICH, in the right of and  
for the benefit of U.S. Aerospace, Inc.

14 Plaintiff,

15 v.

16 JOHN C. KIRKLAND,  
17 LUCE, FORWARD, HAMILTON &  
SCRIPPS LLP,  
18 JERROLD S. PRESSMAN,  
KENNETH J. KOOCK,  
19 MICHAEL L. GOLDBERG,  
JAMES D. HENDERSON,  
20 HAL KOLKER,  
CHARLES S. ARNOLD,  
21 TUSA ACQUISITION CORPORATION,  
AMERICAN DEFENSE  
22 INVESTMENTS, LLC and  
DOES 1 through 10,  
23

24 Defendants,

25 and

26 U.S. AEROSPACE, INC.

27 Nominal Defendant.  
28

) Case No. CV 11-04272 GAF(SPx)

) **VERIFIED SECOND AMENDED  
DERIVATIVE COMPLAINT**

) **JURY TRIAL DEMANDED**

1 Plaintiff Frederick Rich (“Plaintiff”), by and through his attorneys,  
 2 derivatively on behalf of U.S. Aerospace, Inc. (“USAE” or the “Company”), alleges  
 3 upon personal knowledge as to himself and his own acts, and upon information and  
 4 belief as to all other matters, based upon, *inter alia*, the investigation conducted by  
 5 and through their attorneys, which included, among other things, a review of  
 6 Company filings with the Securities and Exchange Commission (“SEC”), news  
 7 reports, press releases, and other publicly available documents regarding the  
 8 Company and the Defendants, as follows:

### 9 10 **I. NATURE OF THE ACTION**

11 1. Plaintiff, derivatively on behalf of Nominal Defendant USAE, seeks  
 12 relief for the damages sustained and to be sustained by the Company for  
 13 wrongdoing committed between April 1, 2010 and the present (the “Relevant  
 14 Period”) against:

- 15 a. John C. Kirkland (“Kirkland”) and Luce, Forward, Hamilton &  
 16 Scripps LLP (“Luce”)<sup>1</sup> for breach of fiduciary duty, aiding and  
 17 abetting breach of fiduciary duty, legal malpractice and corporate  
 18 waste;
- 19 b. Hal Kolker, the sole member of the USAE Board of Directors  
 20 (the “Board”) at the date of the filing of the initial complaint in  
 21 this action on May 18, 2011, for breach of fiduciary duty;
- 22 c. certain former members of USAE’s Board, Jerrold S. Pressman  
 23 (“Pressman”), Kenneth J. Koock (“Koock”), Michael L.  
 24 Goldberg (“Goldberg”), and James D. Henderson (“Henderson”)  
 25 (collectively, the “Former Director Defendants”), for breach of  
 26 fiduciary duty and corporate waste;

27  
 28 <sup>1</sup> In March of 2012, the Luce firm was acquired by McKenna Long & Aldridge  
 LLP.

- 1           d.     the holders of USAE's Series E Preferred Stock, TUSA  
2           Acquisition Corp. ("TUSA") and American Defense  
3           Investments, LLC ("ADI") (the "Majority Shareholder  
4           Defendants"), for breach of fiduciary duty; and  
5           e.     Charles S. Arnold ("Arnold") for aiding and abetting breach of  
6           fiduciary duty.<sup>2</sup>

7           2.     By the acts alleged herein, Defendant Kirkland has violated numerous  
8           provisions of the California Rules of Professional Conduct, ignored irreparable and  
9           unwaivable conflicts between his client USAE and ADI, and subsumed his  
10          obligations to USAE in favor of the interests of ADI and the other Series E preferred  
11          shareholders.

12          3.     The Former Director Defendants, which were hand-picked by Majority  
13          Shareholder Defendant ADI, breached their fiduciary duties by purporting to ratify  
14          Kirkland's wrongful conduct to the detriment of the Company and committed  
15          corporate waste by permitting the Company to issue millions of shares of Company  
16          stock to the Majority Shareholder Defendants without meaningful consideration, and  
17          by permitting millions of shares to be issued to purported "consultants", Omnicom  
18          Holdings, Inc. ("Omnicom") and Summit Trading, without meaningful  
19          consideration. As active participants in the alleged fraudulent acts alleged herein,  
20          any litigation demand made on the Former Director Defendants pursuant to Rule  
21          23.1 of the Rules of the Court of Chancery of the State of Delaware ("Chancery  
22          Court Rules") would have been futile.

23          4.     Moreover, the Majority Shareholder Defendants, ADI and TUSA,  
24          which control a majority of the USAE Board, have breached and continue to breach  
25          their fiduciary duties owed to the Company and the minority shareholders by  
26          insisting that the Company be placed into bankruptcy rather than accept financing,

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27          <sup>2</sup>       Defendants Kirkland, Luce, Kolker, Pressman, Kooch, Goldberg, Henderson,  
28          TUSA, ADI and Arnold are collectively referred to herein as the "Defendants."

1 which could allow the Company to become profitable under the premise that the  
2 Majority Shareholder Defendants could emerge from the proceedings owning a shell  
3 company containing the necessary licenses to enter into government contracts and  
4 other valuable Company assets.

5       5. Also, Defendant Arnold has aided and abetted the aforementioned  
6 breaches of fiduciary duty by Defendants Kirkland and Luce, the Former Director  
7 Defendants and the Majority Shareholder Defendants by, among other things,  
8 misrepresenting to the Company that he and Defendant Kirkland owned USAE debt  
9 which was actually owned by another party. Defendant Arnold, along with  
10 Defendant Kirkland, then directed the Company to expand the Board and to appoint  
11 four of the Former Director Defendants to the USAE Board. The Former Director  
12 Defendants then granted Arnold's company, Summit Trading, an option to purchase  
13 5 million shares of USAE for no consideration. Defendant Arnold also participated  
14 in engineering a transaction which resulted in Defendants ADI and TUSA owning  
15 the majority of USAE's voting shares. Defendant Arnold's wife is the President and  
16 shareholder of TUSA. Finally, after Defendants Kirkland and Pressman engineered  
17 a sham settlement with Omnicom whereby Omnicom was issued 15 million shares  
18 of Company stock worth \$2.3 million without consideration to the Company,  
19 Defendant Arnold directed his employees to re-issue 4.5 million of those shares to a  
20 series of other entities.

21       6. Finally, Defendant Kolker, the only member of the USAE Board at the  
22 time of the initial filing of this action, May 18, 2011, was brought in to represent the  
23 interests of, and be beholden to, Kirkland, Arnold and the other Defendants  
24 following the resignation and/or termination of the other Board members when the  
25 wrongdoing described herein was brought to light. Indeed, Defendants Arnold and  
26 Kirkland initially introduced Defendant Kolker to USAE in early 2010 in order that  
27 Defendant Kolker might provide financing to the Company. Defendants Arnold and  
28 Kirkland represented to USAE's then Chief Executive Officer, David Duquette, that

1 Defendant Kolker had previously engaged in a number of business deals with  
2 Arnold and Kirkland. While he did not invest in the Company at that time, Arnold  
3 and Kirkland turned to him in March of 2011 in order to ensure that their interests  
4 would be protected.

5 7. Defendant Kolker signed, purportedly on April 29, 2011, and  
6 purportedly on behalf of USAE, documents entitled, "Mutual General Release" in  
7 an attempt to release Defendants Arnold, Goldberg, Henderson, and Kooch from  
8 any and all liability for claims the Company has against them. Kolker also signed  
9 similar documents, purportedly on behalf of USAE, titled, "Settlement Agreement  
10 and Release" in an attempt to release Defendants ADI and TUSA from liability for  
11 any and all claims the Company has against them. Any litigation demand made on  
12 Defendant Kolker pursuant to Rule 23.1 of the Chancery Court Rules would have  
13 been futile given the fact that: (a) Defendant Kolker had prior business and personal  
14 dealings with other Defendants, including Defendants Arnold and Kirkland, and  
15 therefore was not and is not independent; and (b) Defendant Kolker's actions while  
16 serving as the solitary Board member of USAE, including the signing of the  
17 Releases, demonstrate that he was beholden to the Defendants.

## 18 19 **II. JURISDICTION AND VENUE**

20 8. This Court has jurisdiction over this action pursuant to 28 U.S.C.  
21 §1332(a)(1) in that Plaintiff and Defendants are citizens of different states and the  
22 matter in controversy exceeds \$75,000, exclusive of interests and costs. This action  
23 is not a collusive action designed to confer jurisdiction on a court of the United  
24 States that it would not otherwise have.

25 9. Venue is proper in this Judicial District pursuant to 28 U.S.C.  
26 §1391(b)(2) because a substantial portion of the events or omissions giving rise to  
27 the claims alleged herein occurred within this Judicial District. Moreover,  
28 Defendants have received substantial payments in this Judicial District by doing

1 business here and engaging in numerous activities that had an effect in this Judicial  
2 District.

### 3 4 **III. PARTIES**

#### 5 **A. The Plaintiff**

6 10. Plaintiff **Frederick Rich** is a citizen of the United States of America, is  
7 domiciled in Tomball, Texas and has owned at all times relevant to this action, and  
8 continues to own, the Company's common stock.

#### 9 **B. The Nominal Defendant**

10 11. Nominal Defendant **U.S. Aerospace, Inc.** ("USAE" or the  
11 "Company"), formerly known as New Century Companies, Inc. ("New Century"),  
12 was incorporated in the state of Delaware on August 1, 1980 and headquartered at  
13 10291 Trademark Avenue, Rancho Cucamonga, California, County of San  
14 Bernardino 91730.

15 12. On October 9, 2009, New Century entered into a share exchange  
16 agreement with Precision Aerostructures, Inc. ("PAI") pursuant to which the  
17 President and sole shareholder of PAI, Michael C. Cabral, agreed to transfer all  
18 capital stock of PAI to New Century. USAE operates through PAI. USAE's  
19 common stock is quoted on the Over-the-Counter Bulletin Board ("OTC Bulletin  
20 Board") under the symbol "USAE". On or about April 19, 2010, the Company  
21 changed its name from New Century Companies, Inc. to U.S. Aerospace, Inc.

22 13. USAE is an aerospace and defense contractor engaged in the  
23 production of aircraft assemblies, structural components, and highly engineered,  
24 precision machined details for the United States Department of Defense, United  
25 States Air Force, Lockheed Martin Corporation, The Boeing Company, L-3  
26 Communications Holdings, Inc., the Middle River Aircraft Systems subsidiary of  
27 General Electric Company, and other aircraft manufacturers, aerospace companies,  
28 and defense contractors. The Company supplies structural aircraft parts for military

1 aircraft such as the P-3 Orion, and wide-body commercial airliners such as the  
2 Boeing 747.

3 **C. Defendants Kirkland And Luce, Forward, Hamilton & Scripps LLP**

4 14. Defendant **John C. Kirkland** is a citizen of the United States of  
5 America, is domiciled in California, is an attorney admitted to practice law in the  
6 State of California, at the time of the filing of this action, was “Of Counsel” with  
7 Defendant Luce and worked from the firm’s Los Angeles office. From on or about  
8 February 18, 2009 to March 5, 2011, Defendant Kirkland was a partner of  
9 Defendant Luce. Defendant Kirkland left Luce shortly after the filing of this action.  
10 During the Relevant Time Period, Defendant Kirkland and his law firm, Luce,  
11 served as outside legal counsel to USAE. Defendant Kirkland has been a member  
12 of or associated with at least half a dozen law firms during his legal career,  
13 including: (1) Defendant Luce; (2) Dreier Stein Kahan Browne Woods George; (3)  
14 Lowenstein, Sandler LLP; (4) Greenberg Traurig; LLP; (5) Weissmann Wolff  
15 Bergman Coleman Grodin & Evall LLP; and (6) Cadwalader Wickersham & Taft  
16 LLP. He is also currently the Managing Director at Ironridge Global Partners.

17 15. While a partner at Greenberg Traurig LLP, Defendant Kirkland and the  
18 firm were named in a \$50 million civil suit filed by a mail-order food marketing  
19 company, GreatMeals, USA, Inc. (“GreatMeals”), against former boxing champion  
20 George Foreman over a failed steak venture. The suit claimed that Kirkland  
21 conspired with Foreman to transfer control of certain business opportunities to  
22 Kirkland’s brother, Victor Kirkland. GreatMeals also alleged that the defendants  
23 acted with fraud and malice in an attempt to put it out of business by interfering with  
24 a valuable contract between GreatMeals and Home Shopping Network.

25 16. Defendant Kirkland joined Defendant Luce in 2009 after leaving Dreier  
26 Stein Kahan Browne Woods George in Los Angeles, an affiliate of Dreier LLP that  
27 broke up in January 2009 after Marc Dreier was charged with impersonating an in-  
28 house lawyer at a Canadian pension fund. Dreier pleaded guilty to selling more than



1 \$700 million in fictitious real estate development notes and fake pension plan notes.  
2 The elaborate four-year scheme, which netted roughly \$400 million, led to the  
3 implosion of Dreier's 250-attorney firm, Dreier LLP, and its affiliates, including  
4 Dreier Stein Kahan Browne Woods George. Defendant Kirkland was one of two  
5 former partners from Dreier LLP subpoenaed by the firm's liquidating trustee in  
6 May 2009. The Dreier bankruptcy trustee stated in court documents that he  
7 suspected Kirkland may be essentially engaging in misappropriation and fraud. The  
8 trustee stated: "With his new firm [Luce], Mr. Kirkland may even be directing  
9 [former Dreier] clients to pay [Luce] instead of [Dreier]." In his efforts to marshal  
10 assets for the estate, the bankruptcy trustee obtained a court order to examine  
11 Kirkland under oath. The bankruptcy court also issued a subpoena to Luce's  
12 managing partner, ordering the firm to produce documents relating to the Dreier  
13 bankruptcy.

14 17. At the time of the filing of this action, Defendant **Luce, Forward,**  
15 **Hamilton & Scripps LLP** ("Luce") was a limited liability partnership doing  
16 business in California, with offices located in San Diego, San Francisco, Los  
17 Angeles, Orange County, Carmel Valley and Rancho Santa Fe. At the time of the  
18 initiation of this action, each of Luce's ninety-one partners was a citizen of the  
19 United States of America and was domiciled in California. Luce was, therefore, a  
20 citizen of California. On March 6, 2012, Defendant Luce merged with McKenna  
21 Long & Aldridge LLP, and is now known by and rendering professional services  
22 under the name McKenna Long & Aldridge LLP.

23 18. At the time of the filing of this action, Luce's firm website stated:  
24 "Luce Forward's dynamic practice is home to attorneys working in major business  
25 centers throughout California. We are known as a top law firm throughout the state  
26 and represent clients from across the country. For over 135 years, our mission and  
27 values have been our guide." Luce's mission included "[d]eliver[ing] dedicated  
28 service at a value that larger firms cannot provide" and "[e]xceed[ing] the high



1 expectations of sophisticated clients.” Luce’s values included “[t]eamwork, loyalty,  
2 trust, communication and mutual support.”

3 **D. The Former Director Defendants**

4 19. Defendant **Jerrold S. Pressman** is a citizen of the United States of  
5 America, is domiciled in California and has been a member and Chairman of the  
6 USAE Board since April 5, 2010. The principals of ADI directed Defendant  
7 Kirkland and Defendant Charles S. Arnold to select Defendant Pressman as a Board  
8 member. Defendant Pressman was Defendant Kirkland’s client during all relevant  
9 times on unrelated matters. In or about April 2010, Defendant Pressman received an  
10 option to purchase 1 million shares of USAE stock.

11 20. Defendant **Kenneth J. Koock** is a citizen of the United States of  
12 America, is domiciled in New Jersey and has been a Director of USAE since April  
13 5, 2010. The principals of ADI directed Defendants Kirkland and Arnold to select  
14 Defendant Koock as a Board member. In or about April 2010, Defendant Koock  
15 received an option to purchase 1 million shares of USAE stock.

16 21. Defendant **Michael L. Goldberg** is a citizen of the United States of  
17 America, is domiciled in Florida and has been a Director of USAE since April 5,  
18 2010. The principals of ADI directed Defendants Kirkland and Arnold to select  
19 Defendant Goldberg as a Board member. In or about April 2010, Defendant  
20 Goldberg received an option to purchase 1 million shares of USAE stock.

21 22. Defendant **James D. Henderson** is a citizen of the United States of  
22 America, is domiciled in California and has been a Director of USAE since April 5,  
23 2010. The principals of ADI directed Defendants Kirkland and Arnold to select  
24 Defendant Henderson as a Board member. In or about April 2010, Defendant  
25 Henderson received an option to purchase 1 million shares of USAE stock.

26 23. Defendants Pressman, Koock, Goldberg, and Henderson are sometimes  
27 collectively referred to herein as the “Former Director Defendants.”  
28

1 **E. Defendant Hal Kolker**

2 24. Defendant **Hal Kolker** was appointed to the USAE Board on March  
3 16, 2011 and was the sole member of the Board upon the filing of the initial  
4 complaint in this action on May 18, 2011. Defendant Kolker is a citizen of the  
5 United States of America and is domiciled in California.

6 **F. Defendant Charles S. Arnold**

7 25. Defendant **Charles S. Arnold** is a citizen of the United States of  
8 America, is domiciled in Florida and is a principal of Summit Trading Limited.  
9 Defendant Arnold and Defendant TUSA share the same address: 520 Brickell Key  
10 Drive, Suite 1607, Miami, Florida 33131.

11 26. Upon information and belief, Defendant Arnold has a pattern and  
12 practice of entering into stock promotion contracts with penny stock companies in  
13 return for a substantial amount of stock in the company. He, along with others,  
14 publishes or promotes positive stories about those fledgling companies and is then  
15 able to reap a windfall when the positive stories spur investors to drive these stock  
16 prices higher.

17 27. On May 21, 2002, a federal grand jury returned an Indictment charging  
18 Defendant Arnold and others with one count of wire, mail and securities fraud  
19 conspiracy, in violation of 18 U.S.C. § 371, thirteen counts of wire fraud, in  
20 violation of 18 U.S.C. §§ 1343 and 1346, one count of mail fraud, in violation of 18  
21 U.S.C. §§ 1341 and 1346, and one count of securities fraud, in violation of 15  
22 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5. Defendant Arnold was a stock promoter  
23 and a controlling shareholder of a company named A1 International, Inc.  
24 (“AWON”), the common stock of which was publicly traded on the over-the-  
25 counter market. According to the Indictment, Defendant Arnold and others agreed  
26 to pay an approximately \$2.5 million undisclosed kickback to a confidential  
27 informant for the FBI and others to induce a fictitious foreign mutual fund to buy  
28

1 approximately 4 million shares of overpriced AWON stock for a total of \$8 million.  
2 Defendant Arnold, however, was ultimately acquitted.

3 **G. The Majority Shareholder Defendants**

4 28. **Defendant TUSA Acquisition Corp. (“TUSA”)**, at the time of the  
5 filing of this action, was a holder of 127,931 shares of USAE Series E Preferred  
6 Stock, each of which was convertible into 500 shares of USAE common stock.  
7 TUSA is incorporated in Delaware and its principle place of business is located  
8 (with Defendant Arnold) at 520 Brickell Key Drive, #1607, Miami, Florida 33131.  
9 TUSA’s President and stockholder is Daisy Rodriguez, Defendant Arnold’s wife.

10 29. **Defendant American Defense Investments, LLC (“ADI”)**, at the time  
11 of the filing of this action, held 255,862 shares of USAE Series E Preferred Stock,  
12 each of which was convertible into 500 shares of USAE common stock. ADI is  
13 incorporated in Delaware and its principle place of business is located at 1301 South  
14 75th Street, Suite 100, Omaha, Nebraska 68124. ADI’s Managing Director and only  
15 member is Richard N. Berkshire of Berkshire & Burmeister, located at 1301 South  
16 75th St., Suite 100, Omaha, Nebraska 68124. Richard N. Berkshire is citizen of the  
17 United States of America and is domiciled in Nebraska. Therefore, ADI is a citizen  
18 of Nebraska.

19 30. Defendants TUSA and ADI, by virtue of their conversion rights,  
20 control a majority of the shares of USAE and elect its Board. Defendants TUSA  
21 and ADI are sometimes referred to herein as the “Majority Shareholder  
22 Defendants.”

23 **H. The Doe Defendants**

24 31. Plaintiff does not know the true names and capacities, whether  
25 individual, corporate, associate, or otherwise of defendants Does 1 through 10,  
26 inclusive. Plaintiff is informed and believes and based upon such information and  
27 belief alleges that each fictitious defendant was in some way responsible for,  
28 participated in, or contributed to the matter and things of which Plaintiff complains

1 herein, and in some form and under some theory, is subject to liability therefore.  
2 When the exact nature and identity of such fictitious defendants' responsibility for,  
3 participation in, and contribution to the matters herein alleged is ascertained,  
4 Plaintiff will seek leave to amend this Complaint to set forth the same.

#### 6 **IV. SUBSTANTIVE ALLEGATIONS**

7 32. In October 2009, when New Century purchased PAI, New Century's  
8 Board consisted of David Duquette, the President of the Company, and Josef  
9 Czikmantori, the acting Secretary.

10 33. At the time, a New York-based asset management firm owned  
11 approximately \$3.5 million of New Century's debt. Subsequent to New Century's  
12 October 2009 purchase of PAI, Defendants Kirkland and Arnold acquired from the  
13 New York-based asset management firm, for approximately \$100,000, an option to  
14 purchase its debt. Defendants Kirkland and Arnold then approached Mr. Duquette  
15 and Mr. Czikmantori and threatened to foreclose on New Century's debt unless New  
16 Century provided Defendants Kirkland and Arnold with a controlling number of  
17 seats on its Board. Defendants Kirkland and Arnold based these threats, in part, on  
18 the false pretense that they actually owned the debt.

19 34. As a result, on or about April 5, 2010, Mr. Duquette and Mr.  
20 Czikmantori expanded the number of directors on New Century's Board to seven  
21 and appointed six new directors. Of those six new directors, Defendants Pressman,  
22 Koock, Goldberg and Henderson were appointed at the direction of Defendants  
23 Kirkland and Arnold. The principals of ADI directed Defendants Kirkland and  
24 Arnold to select those specific new Board members. Also appointed at that time  
25 were Michael C. Cabral and Randall Humphreys. After passing those resolutions,  
26 Mr. Duquette remained the Company's CEO and kept this seat on the Board, while  
27 Mr. Czikmantori remained Secretary but resigned his Board membership.

28

1           35. The newly expanded Board met a few days later and, upon information  
2 and belief, passed a resolution providing the Board members with options to  
3 purchase one million shares of USAE common stock at \$0.13 a share. Half of those  
4 options would vest one year from the resolution and the other half would vest a year  
5 later. The Board gave an additional option to purchase 5 million shares to Summit  
6 Trading, owned or controlled by Defendant Arnold,<sup>3</sup> in exchange for unspecified  
7 “investor relations” services. The Board also established Defendant Kirkland and  
8 his law firm, Defendant Luce, as outside counsel and, on or about April 19, 2010,  
9 changed New Century’s name to U.S. Aerospace, Inc.

10           36. Shortly thereafter, Defendant Kirkland spearheaded a transaction in  
11 which the Company sought to purchase Antonov USA from ADI and TUSA.  
12 Defendant Arnold’s wife, Daisy Rodriguez, is the President and stockholder of  
13 TUSA. The supposed purpose of the transaction was for the Company to acquire  
14 Antonov USA’s sole asset, its purported existing relationship with the Antonov  
15 Company, a Ukrainian state-owned company with the capacity to undertake large  
16 aeronautical manufacturing projects.

17           37. On or about July 1, 2010, USAE purchased Antonov USA in exchange  
18 for an aggregate of 383,793 shares of Series E Convertible Preferred Stock with a  
19 par value of \$1.00. Two-thirds of that stock was paid to ADI. Under the governing  
20 documents, the holders could convert each series E share into 500 shares of USAE  
21 common stock. The Series E voted together with the common stock as a single class  
22 on an as-converted basis, and the Series E benefitted from non-dilution protection.  
23 Given the number of circulating common shares, after the purchase of Antonov  
24

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25 <sup>3</sup> Summit Trading Limited is a Bahamian holding company and is owned by  
26 the Weast Family Trust, a private irrevocable trust established for the benefit of  
27 Defendant Arnold, Daisy Rodriguez, Stephanie Kaye and Tracia Fields. Defendant  
28 Arnold is the settler of the Weast Family Trust, and his interest in Summit Trading  
Limited is approximately 80% of the value.

1 USA, the Series E holders, *i.e.*, ADI and TUSA, held the majority of voting shares  
2 in USAE.

3 38. The same day as the Antonov USA purchase, USAE entered into a  
4 Strategic Cooperation Agreement with the Antonov Company.

5 39. On July 6, 2010, the Company filed a report on Form 8-K with the SEC  
6 concerning a press release issued that same day announcing the Company's  
7 "Strategic Cooperation Agreement" with Antonov to bid on a Request for Proposal  
8 ("RFP") from the U.S Air Force for the KC-Y Tanker Modernization Program. The  
9 press release stated, in relevant part:

10 LOS ANGELES—(BUSINESS WIRE)—U.S. Aerospace, Inc.  
11 (OTCBB: USAE), an aerospace and defense contractor, today  
12 announced that it has entered into a Strategic cooperation agreement  
13 with Antonov to bid on the request for proposal to supply 179 aerial  
14 refueling tankers to the U.S. Air Force.

15  
16 The airframes will be built in Ukraine by Antonov, with final assembly  
17 at a new U.S. Aerospace, Inc. facility in the United States. The KC-X  
18 Tanker Modernization Program, expected to be the largest contract in  
19 Pentagon history, represents the first step of the strategic cooperation  
20 between Antonov and U.S. Aerospace, Inc. to supply and service  
21 aircraft to the U.S. military and commercial aircraft markets.

22 Antonov designed, built and operates the world's largest aircraft, the  
23 AN-225, which provides strategic airlift capabilities for the U.S.  
24 Department of Defense and others. Antonov and U.S. Aerospace, Inc.  
25 will bid three models for the KC-X program, the AN-124-KC, AN-122-  
26 KC, a twin-engine variant of the AN-124-100 with advanced engines,  
27 electronics and avionics, and AN-112-KC, an updated airframe  
28 designed specifically to meet the tanker program requirements.

1 “Antonov’s participation in the U.S. Air Force tanker bid with U.S.  
2 Aerospace, Inc. is an historic opportunity for Antonov to showcase its  
3 premier design, engineering and manufacturing capabilities to the  
4 world,” said Dmytro S. Kiva, President and General Designer of  
5 Antonov. “We are extremely pleased to have entered into this  
6 agreement with U.S. Aerospace, Inc., and are looking forward to the  
7 long-term mutual benefits of our partnership.”

8 “We are honored to be partnering with the world’s premier designer  
9 and manufacturer of large transport aircraft,” said Jerrold S. Pressman,  
10 Chairman of U.S. Aerospace, Inc. “We are particularly impressed by  
11 Mr. Kiva’s strong leadership and vision for the future. Together we can  
12 deliver the U.S. Air Force a superior tanker at the most competitive  
13 price.”  
14

15 USAE, Current Report (Form 8-K), at Ex. 1 (July 6, 2010).

16 40. On or about July 9, 2010, USAE submitted a response to the RFP,  
17 under which the aircraft components would have been built by Antonov Company in  
18 the Ukraine, with final assembly by USAE. Since the U.S. Air Force denied the  
19 Company’s request for an extension of the bidding deadline on July 8, 2010, the  
20 Company bid only one model of aircraft, the AN-112-KC.

21 41. The Boeing Company and The European Aeronautic Defense and  
22 Space Company N.V., also bid on the RFP utilizing existing wide body commercial  
23 airliners as the basis for their KC-X tanker proposals. Both designs were advanced  
24 and well developed, and both companies invested considerable resources into  
25 designing their tankers and in preparing their responses to the RFP. Both companies  
26 spent substantially more time, money and effort preparing their RFP responses than  
27 USAE did.  
28



1           42. Ultimately, the Air Force found USAE's bid untimely and failed to  
2 consider it. On August 2, 2010, the Company submitted a bid protest to the General  
3 Accounting Office ("GAO"). On October 6, 2010, the GAO denied the Company's  
4 bid protest. USAE and the Antonov Company have yet to submit a successful bid  
5 together, and, ultimately, the Company recorded an impairment charge equal to the  
6 net book value of the Strategic Cooperation Agreement with Antonov.

7           43. On or about July 14, 2010, a company called Omnicom filed a  
8 complaint against USAE alleging that in June 2010, USAE entered into an  
9 agreement with Omnicom to facilitate USAE's introduction to the Antonov  
10 Company (the "Omnicom Complaint"). Allegedly, the terms of the contract  
11 obligated USAE to pay a \$1.5 million fee due within forty-eight hours after  
12 completion of a cooperation agreement between the Antonov Company and USAE,  
13 and another \$1.5 million upon the consummation of a successful bid resulting from  
14 that agreement. At the time, USAE had insufficient funds to pay that fee, and did  
15 not anticipate obtaining such a significant sum anytime soon thereafter. Defendant  
16 Kirkland was purported to have participated in negotiating the Omnicom agreement.

17           44. According to Omnicom's allegations, the contract was memorialized by  
18 a single letter of acknowledgement, dated June 4, 2010, purportedly sent by  
19 Omnicom CEO, Mark Suleymanov, to Board member Jerrold Pressman, who, upon  
20 information and belief, was at the time and continues to be a client of Defendant  
21 Kirkland on other unrelated matters. The Omnicom Complaint failed to allege any  
22 specific actions taken by Omnicom in performance of the alleged contract with  
23 USAE, much less explain why such actions constituted fair value for \$3 million.

24           45. Regardless, on July 15, 2010, *one day after the filing of the Omnicom*  
25 *Complaint*, Defendant Kirkland and Defendant Pressman entered into a settlement  
26 agreement with Omnicom on behalf of USAE. The settlement was a "pre-  
27 packaged" transaction, agreed to even before the Complaint was filed, to facilitate  
28 the issuance of free-trading shares. Under the terms of the settlement agreement,

1 Omnicom received 15 million free-trading shares of USAE common stock. At that  
 2 time, 15 million shares of USAE common stock held a value of approximately \$2.3  
 3 million. The settlement agreement specifically excluded from its release any  
 4 subsequent claim by Omnicom that it was entitled to another \$1.5 million in the  
 5 event that the Company and the Antonov Company were successful in bidding on  
 6 the project. Furthermore, Omnicom was represented in the litigation against USAE  
 7 by attorney Matthew B. Gruenberg, a solo practitioner based in Santa Monica,  
 8 California, who had been an associate with Drier LLP at the time Kirkland was a  
 9 partner with that now-defunct firm. Mr. Gruenberg also represents Defendant  
 10 Pressman in other litigation where Defendant Pressman is being sued for investment  
 11 fraud. The Omnicom settlement agreement was not submitted to the Company  
 12 Board for approval before it was executed.<sup>4</sup>

13 46. On or about August 11, 2010, USAE's Board of Directors post-hoc  
 14 ratified the Omnicom settlement agreement and Defendant Kirkland's role in  
 15 approving the settlement. In that same resolution, the Board accepted Mr.  
 16 Duquette's resignation as CEO and as a Board member, effective August 16, 2010,  
 17 and appointed James Worsham to the Board and as the Company's new CEO,  
 18 effective September 29, 2010. Mr. Czikmantori also resigned as Secretary effective  
 19

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21 <sup>4</sup> The Company's Form 10-Q/A for the period ending June 30, 2010, dated  
 22 September 13, 2010, filed with the SEC discloses:

23 On August 20, 2010, we instructed our transfer agent to issue 5 million  
 24 shares and agreed to issue an additional 10 million shares to Omnicom  
 25 Holdings pursuant to a stipulated settlement in an action filed by  
 26 Omnicom for a \$1.5 million commission claimed due in connection  
 27 with our agreement with Antonov. The issuance was exempt from  
 28 registration pursuant to Section 3(a)(10) of the Securities Act as an  
 issuance approved by a court after a hearing upon the fairness of its  
 terms and conditions.

USAE, Quarterly Report (Form 10-Q/A), at \*8 (September 13, 2010).

1 August 16, 2010. Michael C. Cabral was appointed President effective August 23,  
2 2010.

3 47. Following the Omnicom settlement, 4.55 million shares of stock  
4 initially issued to Omnicom were then reissued to a number of other entities,  
5 including Zynatech, Aegis Capital, Adanta Partners, Omnivest Holdings, Net Gen,  
6 Oceanic Consulting, Insight Capital Consultants and James Meagher at the direction  
7 of Tom Biggs and Dick Fixaris, employees of Defendant Arnold. At least one of  
8 those companies had a pre-existing relationship with USAE.

9 48. The Company's report on Form 10-Q for the period ending September  
10 30, 2010 reported,

11 Operating loss for the three and nine months ended September 30,  
12 2010, was \$12,156,947 and \$14,235,297 compared to \$66,166 and  
13 \$108,525 for the three and nine months ended September 30, 2009. ***The***  
14 ***increase in loss of \$12,090,781 and \$14,126,772, respectively, is***  
15 ***primarily due to the impairment charge for the Strategic Cooperation***  
16 ***Agreement***, the acquisition of PAI, the reclassification of NCR as a  
17 discontinued operation ***and due to increased consulting services for***  
18 ***new aerospace marketing and service contracts.***

19 USAE, Quarterly Report (Form 10-Q), at \*4 (December 16, 2010) (emphasis  
20 added). The 10-Q goes on to report that \$11,513,790 of this loss for the nine  
21 months ended September 30, 2010 was due to a "non-cash expense for impairment  
22 of an intangible asset," that \$319,319 of the loss was from "stock issued for  
23 services," and another \$1,500,000 of the loss was due to "stock issued for the  
24 settlement of a liability...." *Id.* at \*5.

25 49. By December 2010, USAE required further financing to remain a going  
26 concern. The sole potential funding offer to USAE came from the same New York-  
27 based asset management firm that had extended credit, as discussed above. The  
28 tentative proposed terms were beneficial to the Company, but required the Company

1 to terminate the rights of the Series E holders in order to encourage further  
2 investment by market participants who otherwise would shy away from a company  
3 controlled by the Series E holders.

4 50. When informed of the proposed lender's terms, Defendant Kirkland  
5 unilaterally rejected the proposed funding on behalf of the Company. Further,  
6 Defendant Kirkland asserted that he would prefer placing the Company into  
7 bankruptcy rather than accept the funding under the premise that the Series E  
8 holders could emerge from the proceedings owning a shell company containing the  
9 necessary licenses to enter into government contracts as well as the cooperation  
10 agreement with the Antonov Company.

11 51. Defendant Kirkland attempted to effect this purported rejection without  
12 consulting with the Board or the Company's CEO, Mr. Worsham. The Company's  
13 financial situation became increasingly precarious. Evidently, Defendant Kirkland  
14 and the Series E holders are in fact resigned to placing the Company in bankruptcy.  
15 Mr. Worsham and the Company, however, believe that with financing, USAE can  
16 avoid bankruptcy, become profitable, and protect the interests of the common  
17 shareholders and USAE's creditors.

18 52. In late 2010, Mr. Worsham retained the law firm of Akin Gump Strauss  
19 Hauer & Feld LLP ("Akin Gump") to investigate Defendant Kirkland's actions.  
20 The Former Director Defendants were unaware that Akin Gump had been engaged  
21 by Mr. Worsham to conduct an investigation into their conduct and that of  
22 Defendant Kirkland.

23 53. On January 26, 2011, Akin Gump produced a memorandum (the "Akin  
24 Gump Memo") describing misconduct by Kirkland and his colleagues, concluding  
25 that Kirkland had placed his own interests and those of the Majority Shareholder  
26 Defendants ahead of the interests of the Company, in violation of his professional  
27 and fiduciary duties. The Akin Gump Memo recommended that, at a minimum,  
28 Kirkland and his colleagues be divested of their duties.

54. On January 27, 2011, following Mr. Worsham's dissemination of the Akin Gump Memo to the Board, Mr. Worsham, Mr. Cabral and independent Director Randall Humphreys were removed, without cause, from USAE's Board by Stockholder Written Consent signed by Richard Berkshire on behalf of Defendant ADI. Mr. Cabral was also removed as President of the Company at a January 28, 2011 Board meeting. Mr. Worsham resigned a short time later by letter dated February 11, 2011, citing his opposition to Defendant Kirkland's conduct.

55. On January 28, 2011, the Company filed form 15-12G with the SEC to deregister its stock. It reported a net loss for the quarter ended September 30, 2010, of \$11.5 million on revenue of \$660,144.

56. In an attempt to exculpate themselves from any claims of illegal activity, breach of fiduciary duty or the like, Defendants Arnold, Goldberg, Koock and Henderson enlisted the help of Defendant Kolker and purportedly each entered into a "Mutual General Release" (the "Releases"). Defendant Kolker was the only counterparty signatory to the individual Releases, signing on behalf of both USAE and PAI. The releases were drafted in the broadest possible terms to release the covered Defendants from liability for:

*[A]ny and all causes of action, rights, obligations, damages, liabilities and claims of any kind or nature whatsoever, at law and in equity, including without limitation all possible claims for breach of contract, quantum meruit, breach of fiduciary duty, aiding and abetting, fraud, negligent misrepresentation, wrongful termination, discrimination, sexual harassment, corporate waste, misappropriation, intentional misconduct, professional misconduct, malpractice, professional negligence, negligence, unpaid fees, salary, wages, vacation and overtime, and all claims in any way arising out of or relating to any relationship or dealings involving any of the USAE Parties (defined below) and any of the Releasee Parties (collectively, "Claims").*

1 (Emphasis added). As the Releases state, it was “the parties’ intention to fully,  
2 finally and forever settle, release and resolve all claims, regardless of whether  
3 known or unknown, foreseen or unforeseen, suspected or unsuspected, vested or  
4 contingent, accrued or unaccrued.”

5 57. There is no indication of what consideration, if any, was given in return  
6 for these extremely broad Releases executed in favor of Defendants Arnold,  
7 Goldberg, Koock and Henderson. More importantly, the timing of the Releases  
8 themselves indicates a serious lack of trustworthiness. The Releases were  
9 purportedly executed on April 29, 2011, after the Akin Gump Memo had been  
10 issued and circulated and just before the filing of this lawsuit. Therefore, at the  
11 purported time of the signing of the Releases, Defendants well-knew that they were  
12 likely to become defendants in a lawsuit in the very near future.

13 58. In addition, it would be subjectively and objectively unreasonable for  
14 any person or persons, acting on behalf of USAE, to give up the right to investigate  
15 and prosecute potentially meritorious claims on behalf of the Company against the  
16 Former Director Defendants. However, because of his personal and business  
17 dealings with the Former Director Defendants, it was in Defendant Kolker’s self-  
18 interest to attempt to exculpate the former Board members, rather than act on the  
19 wrongdoing alleged herein.

20 59. In light of the serious nature of the breaches of fiduciary duty alleged  
21 herein, the execution of the Releases represents an independent, actionable breach of  
22 fiduciary duty. Additionally, because Defendant Kolker is an interested and  
23 conflicted party who is beholden to Defendants Kirkland and Arnold—due to  
24 extensive personal and financial ties—it would be impossible for him to act in a  
25 reasonable and/or objective manner. As such, the Releases are the product of fraud  
26 and are invalid and unenforceable.

27 60. Defendant Kolker also executed releases benefiting ADI and TUSA,  
28 which were substantially the same as those entered into with Defendants Arnold,

1 Goldberg, Koock and Henderson. The releases that were executed on behalf of ADI  
2 and TUSA suffer from the same infirmities as the other Releases, *i.e.*, they are  
3 unreasonable and the product of Defendant Kolker's self-interested desire to  
4 exculpate his business associates and friends. In addition, while the ADI and TUSA  
5 releases recite the inclusion of consideration on behalf of the "Releasees," that  
6 consideration was likely worthless at the time of the signing of the contracts. As the  
7 ADI and TUSA releases provide, ADI agreed to the quitclaiming of "[t]wenty  
8 thousand (20,000) shares of Series E Convertible Preferred Stock ... convertible into  
9 10,000,000 shares of Common Stock," and TUSA agreed to the quitclaiming of  
10 "[t]en thousand (10,000) shares of the Series E Convertible Preferred Stock ...  
11 convertible into 5,000,000 shares of Common Stock." However, the shares  
12 purportedly quitclaimed were virtually worthless on the purported date of the  
13 releases, April 29, 2011, due to the lack of a market.<sup>5</sup> Also, as discussed herein, the  
14 Series E shares that ADI and TUSA claimed to be relinquishing were fraudulently  
15 granted in the first place and therefore were not the legal property of those entities,  
16 rendering the Releases void as the product of fraud and for lack of valid  
17 consideration.

18 61. By the actions alleged herein, Defendant Kirkland and, vicariously,  
19 Defendant Luce violated their professional responsibilities and fiduciary duties  
20 owed to USAE as USAE's outside general counsel. Defendant Kirkland has  
21 consistently placed his own interests and the objectives of other individuals before  
22 those of his client and acted well beyond the scope of his authority. Defendant  
23 Kirkland also violated his fiduciary duties of loyalty, good faith and care to the

---

24 <sup>5</sup> Yahoo finance reports that the adjusted stock price of USAE common stock  
25 on April 29, 2011 was \$0.01. However, the volume on that day was only 54,500  
26 shares and the volume for the two preceding days was 9,400 and 12,800  
27 respectively. With such small volume it is unlikely that ADI or TUSA would have  
28 been able to sell any of the convertible shares, even if they were given the  
opportunity to do so.



1 Company and aided and abetted similar breaches of duty by the Former Director  
2 Defendants and the Majority Shareholder Defendants.

3 62. The Former Director Defendants have similarly breached their  
4 fiduciary duties of care and loyalty. The Former Director Defendants have  
5 abdicated their responsibility to adequately monitor USAE's business dealings and  
6 oversee Defendants Kirkland and Luce.

7 63. Further, the Majority Shareholder Defendants, ADI and TUSA, which  
8 control a majority of the USAE Board, have breached and continue to breach their  
9 fiduciary duties owed to the Company and the minority shareholders by insisting  
10 that the Company be placed into bankruptcy rather than accept financing which  
11 could allow the Company to become profitable and protect the interests of the  
12 common shareholders and USAE's creditors.

13 64. Defendant Arnold has aided and abetted each of the foregoing breaches  
14 of fiduciary duty by Defendants Kirkland and Luce, the Former Director Defendants  
15 and the Majority Shareholder Defendants.

16  
17 **V. DERIVATIVE ACTION AND DEMAND**  
18 **EXCUSED ALLEGATIONS**

19 65. Plaintiff brings this action derivatively, in the right and for the benefit  
20 of the Company, to redress Defendants' breaches of fiduciary duties, and  
21 Defendants Kirkland and Luce's legal malpractice.

22 66. Plaintiff is an owner of USAE common stock and was an owner of  
23 USAE common stock at all relevant times hereto.

24 67. Plaintiff will adequately and fairly represent the interests of the  
25 Company and its shareholders in enforcing and prosecuting its rights.

26 68. As a result of the facts set forth herein, Plaintiff has not made any  
27 demand on the Board to institute this action against Defendants. Such demand  
28 would be a futile and useless act because a majority of the members of the Board are

1 incapable of making an independent and disinterested decision to institute and  
2 vigorously prosecute this action.

3         69. At the time of the breaches of fiduciary duty alleged herein, the USAE  
4 Board consisted of Mr. Cabral, Mr. Humphreys, Defendant Goldberg, Defendant  
5 Henderson, Defendant Koock and Defendant Pressman. Defendants Goldberg,  
6 Henderson, Koock and Pressman were each hand-picked by Defendant Kirkland at  
7 the direction of Defendant ADI, a majority shareholder of the Company. Defendant  
8 ADI owns two-thirds of the Series E Convertible Preferred Stock of the Company.  
9 Together with TUSA, ADI owns a majority of the voting shares in USAE. As a  
10 result, four (4) of the six (6) directors in place at the time of the transactions  
11 described herein were controlled by, and beholden to, Defendants Kirkland and  
12 ADI. Therefore, a majority of the Board was conflicted and entangled with and  
13 controlled and dominated by Defendants Kirkland, Luce and ADI, preventing them  
14 from fairly considering, let alone taking, all necessary and proper action on the  
15 Company's behalf.

16         70. Likewise, demand would have been futile if it had been made on the  
17 date of filing of this action. On May 18, 2011, the USAE Board consisted of one  
18 person, Defendant Hal Kolker. Defendant Kolker is a long-time associate and  
19 business partner of Defendants Arnold and Kirkland. In early 2010, Defendants  
20 Arnold and Kirkland introduced Defendant Kolker to USAE in order that Defendant  
21 Kolker might provide financing to the Company. Defendants Arnold and Kirkland  
22 represented to USAE's then Chief Executive Officer, David Duquette, that  
23 Defendant Kolker had previously engaged in a number of business deals with  
24 Arnold and Kirkland. While Defendant Kolker did not invest in the Company at  
25 that time, he was later personally selected by Defendants Kirkland and Arnold to  
26 represent their interests—not the interests of the Company—after the ouster of the  
27 Board in 2011.

28

1           71.     The most striking illustration of Defendant Kolker's allegiance to the  
2 Defendants' interests is his willingness to execute the Releases, which purport to  
3 exculpate Defendants Arnold, Goldberg, Henderson, Koock, ADI and TUSA.  
4 Because the consideration for those Releases is either nonexistent or essentially  
5 worthless, the Releases served no cognizable business interest. In addition, the  
6 purported timing of the signing of the Releases—after the Akin Gump letter was  
7 circulated and just before this action was filed—suggests that Defendant Kolker  
8 intended to protect the Defendants, to the detriment of the Company. Nevertheless,  
9 because USAE's applicable corporate governance documents do not provide for the  
10 maintenance of a one person Board, it is unlikely that Defendant Kolker had the  
11 authority or ability to enter into the Releases on behalf of the Company. Most  
12 importantly, Defendant Kolker's relationship with Defendant Kirkland and Arnold  
13 necessarily renders him interested and biased, rendering the Releases void and  
14 unenforceable. Defendant Kolker's willingness to enter into the Releases, which  
15 serve no reasonable business purpose, demonstrates his inability to objectively judge  
16 a litigation demand.

17           72.     Any demand made pursuant to Rule 23.1 of the Chancery Court Rules  
18 would have been futile as of the filing of this action on May 18, 2011, given the fact  
19 that: (a) Defendant Kolker has prior business and personal dealings with other  
20 Defendants, including Defendants Arnold and Kirkland, and therefore cannot be  
21 considered independent; and (b) Defendant Kolker's actions while serving as the  
22 solitary Board member of USAE, including the signing of the Mutual General  
23 Releases, demonstrate that he was beholden to Defendants.

24           73.     Demand is also excused because the underlying transactions  
25 complained of herein were not and could not have been the product of a valid  
26 exercise of business judgment.

27           74.     Demand is also excused because the wrongs alleged herein constitute  
28 violations of the fiduciary duties owed by the Former Director Defendants and

1 Defendant Kolker and are incapable of ratification by the current Board. The  
 2 Former Director Defendants and Defendant Kolker are subject to liability for  
 3 breaching their fiduciary duties to USAE and Defendant Kolker for also aiding and  
 4 abetting by, *inter alia*, failing to adequately monitor USAE's business dealings and  
 5 oversee Defendants Kirkland and Luce.

6  
 7 **COUNT I**  
 8 **Against Defendants Kirkland And Luce For Legal Malpractice**

9 75. Plaintiff realleges the foregoing paragraphs as though fully set forth  
 10 herein.

11 76. By accepting his position as USAE's outside general counsel,  
 12 Defendant Kirkland obligated himself to "conform his ... representation to the  
 13 concept that the client is the organization itself, acting through its highest authorized  
 14 officer, employee, body, or constituent overseeing the particular engagement." Cal.  
 15 Rules Prof'l Conduct, Rule 3-600; *see also* Model Rules Prof'l Conduct, Rule 1.2  
 16 ("[A] lawyer shall abide by a client's decisions concerning the objectives of  
 17 representation and, as required by Rule 1.4, shall consult with the client as to the  
 18 means by which they are to be pursued."). Defendant Kirkland, however,  
 19 consistently placed the objectives of the Series E holders, *i.e.*, ADI, TUSA and their  
 20 affiliates, before the well-being of the Company, in violation of his ethical duties.

21 77. Defendant Kirkland's continued representation and/or affiliation with  
 22 ADI and its interests constituted conflicts which should have precluded him from  
 23 representing the Company. Defendant Kirkland cannot ethically allow his  
 24 representation of the Company to be directed by a client with adverse interests.  
 25 Defendant Kirkland's loyalty to the Series E holders rather than to the Company has  
 26 caused, and continues to cause, USAE significant material harm. For example,  
 27 Defendant Kirkland, acting at the behest of ADI, prevented the Company from  
 28 considering essential funding offered by Centrecourt because its terms included the

1 limitation of the Series E stock. Defendant Kirkland's preference for placing the  
2 Company into bankruptcy under the theory that the Series E holders would emerge  
3 as the owners of important USAE assets further underscores this conflict.

4 78. The State Bar of California, of which Defendant Kirkland is a member,  
5 proscribes the continued representation of a client in the face of such a conflict. *See*  
6 Cal. Rules of Prof'l Conduct, Rule 3-310(C) ("A member shall not, without the  
7 informed written consent of each client: (1) Accept representation of more than one  
8 client in a matter in which the interests of the clients potentially conflict; or (2)  
9 Accept or continue representation of more than one client in a matter in which the  
10 interests of the clients actually conflict ...."). Defendant Kirkland never provided  
11 the Company with notice of his existing conflict. Even so, such notice and consent  
12 could not absolve Defendant Kirkland of his ethical duty to pursue his client's  
13 objectives rather than those of another.

14 79. Defendant Kirkland similarly violated California Rules of Professional  
15 Conduct, Rule 3-310(B), which states that "[a] member [of the Bar] shall not accept  
16 or continue representation of a client without providing written disclosure to the  
17 client where: ... (3) [t]he member has or had a legal, business, financial,  
18 professional, or personal relationship with another person or entity the member  
19 knows or reasonably should know would be affected substantially by resolution of  
20 the matter; or (4) [t]he member has or had a legal, business, financial, or  
21 professional interest in the subject matter of the representation." *See also* Model  
22 Rules of Prof'l Conduct R. 1.7 ("a lawyer shall not represent a client if the  
23 representation involves a concurrent conflict of interest"). Defendant Kirkland  
24 never attempted to provide such disclosure to the Company, which in any event  
25 would have been inadequate.

26 80. Defendant Kirkland's professional relationship with ADI obligated him  
27 to discontinue his representation of the Company. Under California Rules of  
28 Professional Conduct, Rule 3-300, "[a] member shall not enter into a business

1 transaction with a client; or knowingly acquire an ownership, possessory, security,  
2 or other pecuniary interest adverse to a client ....”

3 81. The California Rules of Professional Conduct prohibited Defendant  
4 Kirkland from participating in USAE’s purchase of Antonov USA. In that  
5 transaction, Defendant Kirkland did disclose his conflict to the Board, which  
6 purported to waive any such conflict on behalf of the Company. However, even if  
7 the Board were empowered to waive a conflict regarding the Company’s counsel,  
8 the majority of the Board members were appointed by ADI and therefore were  
9 hopelessly conflicted in the transaction. The interested directors should have  
10 recused themselves from participating in the vote. Moreover, the purchase involved  
11 the effective sale of control over the Company to another of Defendant Kirkland’s  
12 clients and/or related parties. Defendant Kirkland therefore should not have asked  
13 for, or accepted, a waiver concerning such a clear conflict. Instead, he should have  
14 advised his client to obtain separate counsel to explore whether the transaction  
15 benefitted the Company and its shareholders, or just ADI and the ADI-appointed  
16 Board members.

17 82. Defendant Kirkland also breached his ethical duties by failing to  
18 consult or take direction from his client on important matters. Defendant Kirkland  
19 adopted a role beyond that of outside general counsel by immersing himself in the  
20 day-to-day management of the Company at ADI’s behest. In the context of the  
21 funding offer, it was beyond Defendant Kirkland’s duties as general counsel to take  
22 action without direction from the Company through its highest authorized officer,  
23 James Worsham. *See* Cal. Rules of Prof’l Conduct, Rule 3-600. After receiving  
24 such direction, Mr. Kirkland should have vigorously defended USAE’s position,  
25 whether or not he agreed with it, rather than promoting the position of the Series E  
26 holders.

27 83. Defendant Kirkland also violated his ethical duties by failing to inform  
28 the Company about the Omnicom settlement offer, let alone seek direction regarding

1 whether the offer was sufficiently advantageous. *See* Cal. Rules of Prof'l Conduct,  
2 Rule 3-510.

3  
4 **COUNT II**

5 **Against Defendants Kirkland And Luce, The Former Director Defendants,**  
6 **Defendant Kolker And The Majority Shareholder Defendants For Breach Of**  
7 **Fiduciary Duty; And Against Defendants Arnold, Kirkland, And Luce For**  
8 **Aiding And Abetting**

9 84. Plaintiff realleges the foregoing paragraphs as though fully set forth  
10 herein.

11 85. Defendants agreed to and did participate with and/or aided and abetted  
12 one another in a deliberate course of action designed to divert corporate assets in  
13 breach of fiduciary duties they owed to the Company.

14 86. Defendants have violated fiduciary duties of care, loyalty, good faith,  
15 and independence owed to USAE and its public shareholders, have engaged in  
16 unlawful self-dealing and have acted to put their personal interest and/or their  
17 colleagues' interests ahead of the interests of USAE and its shareholders.

18 87. Defendants Kirkland and Luce owed a fiduciary duty to USAE  
19 stemming from Defendant Kirkland's position as outside general counsel and from  
20 his activities in managing the Company's operations. Defendant Kirkland assumed  
21 an affirmative duty to protect the interest of the Corporation, but also an obligation  
22 to refrain from conduct which would injure the corporation and its stockholders or  
23 deprive them of profit or advantage.

24 88. The Former Director Defendants at all relevant times owed a duty of  
25 loyalty to USAE and its shareholders, including a duty to be independent and  
26 motivated by neither self-interest nor ill will. The Former Director Defendants  
27 breached this duty.

28 89. The Former Director Defendants at all times placed their own interests  
and interests of outside parties before the interests of USAE and its shareholders.



1 The Former Director Defendants approved and/or ratified the transactions that  
2 resulted in the transfer of significant numbers of shares to the Majority Shareholder  
3 Defendants for inadequate consideration to USAE.

4 90. The Former Director Defendants gave Summit Trading, a company  
5 controlled by Defendant Arnold, an option to purchase 5 million shares of USAE for  
6 no consideration to USAE.

7 91. The Former Director Defendants approved and/or ratified the sham  
8 settlement with Omnicom that resulted in millions of shares of USAE being  
9 transferred to outside parties for no consideration to USAE.

10 92. The Former Director Defendants approved and/or ratified Defendant  
11 Kirkland's decision to reject crucial financing needed to keep USAE a going  
12 concern, thereby approving and/or ratifying, or taking no action to prevent actions  
13 that placed USAE in imminent danger of insolvency.

14 93. The Majority Shareholder Defendants at all times placed their own  
15 interests and interests of outside parties before the interests of the minority  
16 shareholders.

17 94. Defendant Arnold aided and abetted the foregoing breaches of fiduciary  
18 duties. Defendant Arnold had actual knowledge of all of Defendant Kirkland's and  
19 the Former Director Defendant's breaches of fiduciary duty. Defendant Arnold,  
20 along with Defendant Kirkland, misrepresented to the Company that Defendants  
21 Arnold and Kirkland owned certain USAE debt which was actually owed by  
22 Centrecourt.

23 95. Defendant Arnold, along with Defendant Kirkland and at the behest of  
24 ADI, directed the Company to expand the Board and to appoint four of the Former  
25 Director Defendants to the USAE Board. The Former Director Defendants installed  
26 by Defendant Arnold then granted Defendant Arnold's company, Summit Trading,  
27 an option to purchase 5 million shares of USAE for no consideration.

28



1           103. There was no substantial consideration received by the Company in  
2 exchange for the shares issued to Omnicom in connection with the Omnicom  
3 settlement.

4           104. There was no substantial consideration received by the Company in  
5 exchange for the option to purchase 5 million shares of USAE granted to Summit  
6 Trading, a company controlled by Defendant Arnold.

7           105. Under the circumstances, no reasonable business person could conclude  
8 that the aforementioned transactions were worthwhile for the Company and in the  
9 Company's best interests.

10          106. Defendants Kirkland and Luce and the Former Director Defendants are  
11 therefore guilty of committing corporate waste and are liable to the Company for all  
12 damages sustained thereby.

13  
14                                   **PRAYER FOR RELIEF**

15          WHEREFORE, Plaintiff demands judgment as follows:

16          A.     Against all of the Defendants and in favor of the Company for the  
17 amount of damages sustained by the Company as a result of Defendants'  
18 misconduct;

19          B.     Granting appropriate equitable relief to remedy Defendants' breaches  
20 of fiduciary duties;

21          C.     Awarding to Plaintiff the costs and disbursements of the action,  
22 including reasonable attorneys' fees, experts' fees, costs, and expenses; and

23          D.     Granting such other and further relief as the Court deems just and  
24 proper.

25          ///

26          ///

27          ///

28          ///

**JURY TRIAL DEMAND**

Plaintiff demands a trial by jury.

DATED: February 19, 2015

WOLF HALDENSTEIN ADLER  
FREEMAN & HERZ LLP  
Francis M. Gregorek  
Betsy C. Manifold  
Rachele R. Rickert  
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Attorneys for Plaintiff

VERIFICATION

I, Frederick Rich, am a party to this action. I hereby verify that I have read the foregoing Verified Second Amended Derivative Complaint, know its contents and authorized its filing. The matters stated in the Verified Second Amended Derivative Complaint are true based on my own knowledge, except as to those matters stated on information and belief, and as to those matters I believe them to be true.

I verify under penalty of perjury that the foregoing is true and correct.

DATE: February 18, 2015

  
FREDERICK RICH

USAE:21555.SAC

**CERTIFICATE OF SERVICE**

I, Kathryn Cabrera, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned a resident of the County of San Diego, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 750 B Street, Suite 2770, San Diego, California 92101.

2. That on February 19, 2015, declarant served the following document(s) via the CM/ECF System to the parties who are registered participants of the CM/ECF System and via U.S. Mail to those parties as indicated on the attached service list who are not registered participants of the CM/ECF System:

**VERIFIED SECOND AMENDED DERIVATIVE COMPLAINT**

3. That there is regular communication between the parties.

I declare under penalty of perjury that the foregoing is true and correct.  
Executed this 19th day of February 2015, at San Diego, California.

  
KATHRYN CABRERA

USAE:21561

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**\*Served via U.S. Mail**